

United States
Circuit Court of Appeals
For the Ninth Circuit

JOHANNA NELSON,

Plaintiff in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN
SHATTUCK,

Defendants in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
DISTRICT OF ALASKA,
DIVISION NO. 1.

RODEN & DAWES,
Attorneys for Plaintiff in Error.

No. 3698

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STATEMENT OF THE CASE

This is an action for damages for the destruction of real and personal property caused by a freshet in a creek known as "Gold Creek" in the City of Juneau, Alaska. A general demurrer to the complaint was sustained and plaintiff brings the case before this court on a writ of error.

The complaint alleges that defendants were the owners of a certain tract of land comprising the delta of Gold Creek; that for the purpose of making this delta attractive for residence purposes and thereby render it marketable, defendants undertook to and did turn the channel of Gold Creek by erecting bulkheads across the old channel and thereby diverting the water in direction of plaintiff's lots. (pp. 17, 21 and 22).

And to protect the left or east bank of the creek, where the plaintiff's property was situated, defendants undertook to and did erect a bulkhead for a distance of several hundred feet. But this bulkhead was so weak and constructed so unskillfully that it could not withstand the force of the water diverted against it by the bulkhead erected on the other side of the new channel and across the old channel. (p. 18).

It is further alleged that plaintiff was ignorant of the fact that the creek was subject to freshets, ignorant of the fact that the channel had been changed, ignorant of the fact that the bulkhead on her side of the creek was so weak that it would not withstand the water or that it was likely to be washed

away. (pp. 18 and 19).

A general demurrer to the original complaint was sustained because it was not alleged that defendants, though they changed the channel of the creek and constructed the bulkheads, yet did not undertake to "actively maintain" the bulkheads after their construction, and there was nothing to show that they had not abandoned the premises after the bulkheads had been constructed.

The amended complaint does not aver the defendants "actively maintained" the bulkheads, for this could not have been proven; but it does allege that defendants constructed them for the purpose of permanently reclaiming the land in question and protecting the banks; that the bulkheads were there and continued to be there for the purpose for which they were originally constructed, and facts are alleged from which it must be concluded that it was the duty of defendants to maintain and keep in repair the bulkheads in question, and that it was their duty not to erect them in the first place unless they did so carefully and skillfully, and in such manner that they would be permanent. (pp. 21 and 23)

The allegations in the amended complaint which it is claimed show that it was the duty of defendants to *continue* to restrain the waters of the creek after they undertook to do so in the first place are, briefly, these:

Defendants owned the delta known as Casey-Shattuck Addition. To reclaim this delta the bulkhead was constructed across the old channel. The land was then platted into streets, blocks and lots; the streets were improved by the public; lots were placed on the market and sold and valuable houses

erected by the purchasers. If the bulkheads across the old channel had been permitted to break, large areas of the land so sold and improved would have been destroyed. Defendants continued to offer lots for sale which would have been submerged had the bulkheads been destroyed or removed. These facts are such as to estop defendants from asserting that they did not maintain the dams or bulkheads, and are such as to estop defendants from asserting that not only to use care in constructing but also in maintaining such bulkheads.

The question before the court is whether or not the facts alleged in the amended complaint are sufficient to entitle plaintiff to recover.

The ruling complained of is the court's order sustaining defendants' general demurrer to the amended complaint.

The claim of right to recover is based upon the negligent construction of the bulkheads and upon the failure of defendants to maintain adequate bulkheads.

The facts in this case were before this court in *Eikland vs. Casey et al*, 266 Fed., 822. And the allegations in the amended complaint in the case at bar are much stronger than the complaint in the *Eikland* case.

ARGUMENT

Defendants had the right to change the channel of Gold Creek. No one could have stopped them doing so.

But when they did change the channel it was incumbent upon them to do the work in such a manner

that no one would thereby be injured.

It was incumbent upon them to make the new channel as large and capacious as the old channel.

Eikland vs. Casey 266 Fed., 822.

It was also incumbent upon defendants to use at least ordinary care and skill in making the bulkheads strong enough to withstand such action of the water as might be reasonably anticipated lest disaster should occur to the property affected by the change.

When defendants constructed the channel to reclaim and market their town lots for permanent occupancy, the public had a right to assume that the new channel was of adequate capacity and that the new banks were of adequate strength to serve the purpose for which they were apparently designed,—and that purpose was to permanently restrain the waters of Gold Creek.

When plaintiff purchased her property on the left or east bank of the new channel, she did so as a stranger in the country and without knowing that the channel was new, essentially artificial, and insufficient in capacity. Neither did she know that the bulkhead on her side of the creek was negligently constructed or that it was so weak that it would probably be washed away by any such freshet as might be reasonably expected to occur at any time.

At the time plaintiff purchased her property the defective bulkhead had been constructed. She knew none of its defects, and had a right to assume it was ample for the purpose for which it was apparently designed.

One who manufactures, or sells, or delivers an article which he knows to be dangerous to life and limb without giving notice of its dangerous quali-

ties or conditions, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there was any contractual relationship between the parties or not:

Thompson on Negligence, Sections 817—821;

Ward vs. Pullman Co., 128 SW., 606;

Walcho vs. Rosenbluth 71 Atl., 566;

Hasbrouck vs. Armour 121 NW., 157;

Waters-Pierce Co., vs. Deselms, 212 U. S., 159;

Standard Oil Co., vs. Parish, 145 Fed., 829;

Wyman vs. Boston B. Co., 175 Fed., 834.

When defendants dammed up the old channel and forced the current of the water against the other bank where plaintiff's property was located, they committed an unlawful act unless they erected bulkheads sufficient to protect that other bank from such current so turned. If the defendants themselves owned the land on the left or east bank at the time the channel was changed and afterwards sold the land on that side of the new channel, the purchaser had a right to assume that the bulkhead was constructed with care and skill and that it was adequate for the purpose for which it was apparently contrived.

One who places on the market and sells land artificially reclaimed and protected against water by artificial structures, guarantees that those structures are designed and constructed with skill and care and are suitable for the purpose for which they are apparently erected.

The person who constructs bulkheads for the purpose of protecting land against freshets or floods, though he be only a contractor and not the owner of the land, becomes liable to one who is injured by the negligence of the contractor, if the injury was such

as would naturally be expected to result from the character of the negligence.

But it is contended that there is nothing to show that defendants did not abandon the bulkheads as soon as they were built, and it is contended that if they did abandon the bulkheads immediately after their construction, defendants cannot be held liable after such abandonment. This is the point on which the lower court decided the case. The lower court said:

“For aught that appears in the complaint, the defendants may in the year 1914 have changed the course of the creek for purposes of their own, and those purposes may have been accomplished and the defendants have lost all interest in the creek or any property adjacent thereto or to be benefited thereby. Surely they would not be liable forever afterwards because on a certain day they changed the course of the creek. It seems to me that they would be liable only during such time as they were maintaining the obstructions complained of.” (p. 12)

There are allegations to the effect that the defects which caused the injury were defects of the original construction. There are also allegations to the effect that the defendants did not abandon the premises, but continued to offer for sale lots dependent for their value upon the effectiveness of the bulkheads.

But assume, for the sake of the argument, that defendants had, shortly after the completion of the new channel, sold all their holdings in Juneau and left the country, would that have relieved them from the natural effects of their own negligence in con-

structing the new channel? Certainly not. They could not relieve themselves from the effects of the wrong without righting the wrong before injury occurred.

5 Thompson on Negligence, Section 6163;

Fritz vs. Watertown, 111 NW, 630;

Schuenke vs. Town of Pine Ridge, 54 NW, 1007;

Bills vs. Town of Kaukauna, 68 NW, 992.

Suppose a person erected a large office building so negligently constructed that in event of an ordinary wind storm or ordinary earthquake shock it would collapse; suppose he sold the building and then left the country; suppose thereafter from the effects of an ordinary wind storm or ordinary earthquake shock the building collapsed as a result of its negligent construction, and that, in consequence, tenants in the building and passersby on the street in front of it were killed, would the party whose negligence was primarily responsible for the catastrophe be relieved from liability because he no longer maintained the building or because he had "ceased to be interested" in it? Certainly not. The party guilty of the wrong which caused the injury is responsible for the damage sustained,—if the injury was the natural result of the negligence or wrong.

Suppose in this case defendants, instead of constructing a channel on the surface, had constructed an underground tunnel to convey the waters of Gold Creek. If such tunnel through inadequate or negligent construction had broken and other people's homes had been washed away, would not defendants have been responsible for the result of their own wrong? And it would have made no difference whether the homes destroyed had been purchased be-

fore or after the tunnel was constructed; nor whether such homes had been purchased from defendants or others. The only question would be whether or not defendants' negligence was the proximate cause of the injury.

In the case at bar it is alleged that plaintiff knew nothing about the change in the channel, the inadequacy of the new channel or the defects in the bulkheads; nor did she know the susceptibility of Gold Creek to freshets, and had no conception of the danger to which she subjected herself when she purchased her property.

But it is averred very clearly that the negligence complained of was the proximate cause of the destruction of plaintiff's home. What more is needed?

It may be true that the new channel was a trap set to catch others and not plaintiff. But the trap was set. Plaintiff did not know it was a trap and did not know it might be sprung at any time. She bought her home not knowing that the new channel was a device which through the negligence of defendants, endangered her property and her life.

If defendants unbeknown to plaintiff had left a powder magazine near her home and under such condition that it was likely to explode at any time, it would make no difference whether she purchased her land from defendants or from somebody else; whether or not she purchased it before or after the magazine was established; nor would it make any difference whether defendants had departed from the property and left the dangerous magazine to fare as it might, or whether they still continued to actively maintain it.

Thompson on Negligence, Secs. 968—981, 1055—

1074.

Addison on Torts, Secs. 227—232.

This is not an action for breach of contract. It is an action in tort based upon a misfeasance.

It is elementary that every person must abstain from such acts as are in their nature dangerous to others. To set a bear trap and then walk away and leave it under such conditions that others are likely to step into it, is an actionable wrong.

Hooker vs. Miller, 37 Ia., 613;

Grant vs. Hass, 75 SW, 342;

Bird vs. Holbrook, 4 Bing., 628;

Jones vs. Nichols, 46 Ark., 207.

Let us see if the allegations in the amended complaint are sufficient to bring the case within the principles announced. In paragraph four it is alleged:

“That the embankment so erected by defendants on the easterly side of said new channel and at the point where said new channel runs adjacent to plaintiff’s lot and for several hundred feet northerly therefrom, were unskillfully and negligently constructed too weak and inadequate to withstand the force of the water which might and would come down said channel during freshets or during such periods of heavy down-pour of rain on the watershed of the said stream as from time to time naturally and generally occurred and might naturally be expected to occur in the future. That by reason of said facts plaintiff’s property aforesaid was by defendants’ said wrongful acts exposed to danger of being washed away by the waters thrown or forced against said property by reason of the

various embankments or bulkheads erected by defendants across and in the old channel of said stream to prevent said stream from spreading in the manner it did before said obstructions, embankments or bulkheads were erected as above described." (p. 18)

In paragraph five, after it is alleged that plaintiff was ignorant of the change in the channel or of the character of Gold Creek, it is further stated:

"That plaintiff was at all times herein mentioned ignorant of the weak and inadequate condition of the said artificial embankment adjacent to her said lots and to the northerly therefrom, and of the negligent condition in which the same had been constructed and maintained, and knew nothing of the danger to which she, her family and property were subjected by reason of defendants' said negligent and wrongful acts above described."

In paragraph six it is alleged that the defendants were familiar with the character of Gold Creek and the freshets that habitually visited the section, and understood fully the weak condition of the bulkheads and knew their inadequacy. It is then alleged:

"That by reason of said facts above set out, plaintiff's said property was at all times exposed to the danger of being washed away by freshets in said stream and plaintiff alleges that defendants were grossly negligent in this that they failed to construct and maintain on the easterly side of said stream adjacent to plaintiff's said property and for several hundred feet northerly therefrom, a bulkhead or

embankment adequate to protect plaintiff's said property against any water that would be forced against said bulkhead or embankment by the said change in the course of said stream or by the erection or maintenance of a bulkhead, embankment or obstructions in and across the old channel or said stream, preventing said stream as aforesaid from spreading in a westerly direction in event of freshets, in the same manner that said stream was wont to do before the said change in the course of said stream was caused by defendants as aforesaid." (p. 20)

The seventh paragraph of the amended complaint sets out in detail the facts from which the following conclusion is alleged:

"That by reason of said facts above set out, it was the duty of defendants to at all times keep and maintain said bulkheads or embankments in good condition or repair and in every way edaquate to keep and restrain the waters of said stream within the said new channel and prevent said waters from flowing on or in any manner injuring the said adjoining premises." (p. 22)

Paragraph eight of the amended complaint describes the manner in which the injury occurred to wit:

"The waters in said stream were prevented from spreading freely in a southwesterly direction and were forced up against the said artificial and inadequate embankments adjacent to plaintiff's said lots and northerly therefrom, which embankments by reason of said weakness and inadequacy, gave way under the force of said waters which latter then and there nec-

essarily by reason of defendants' said wrongful acts above described, washed away both of plaintiff's said houses above described, and destroyed all the improvements on said lots, etc." (p. 23)

On the question of negligence it is difficult to discern the difference in principle between the case at bar and those cases where a dam is constructed in the creek for storing water for industrial purposes.

If a dam be erected in the channel of a water course and it gives way through faulty and negligent construction, the party who is guilty of the negligence which caused the injury must pay the damages naturally resulting and of which the negligence was the proximate cause. And it would make no difference whether the property destroyed originally was owned by the defendant and was sold by him after the dam was constructed, or whether it was owned by persons in no manner in privity with defendant.

The actionable wrong consists in negligently exposing others to danger.

Nor could the delinquent party relieve himself from the consequences of his own delinquency by abandoning the dam while the dam, due to its faulty construction, remained a menace to the property below.

Eikland vs. Casey, 266 Fed., 822;

City Water Power Co. vs. Fergus Falls, 128 NW, 817;

Arave vs. Idaho Canal Co., 46 Pac., 1024;

Free vs. Parr Schoals Power Co., 97 SE, 243;

Beauchamp vs. Taylor, 111 SW, 609.

In the case of Arave vs. Idaho Canal Company, the court had occasion to consider the rights of those

who acquired property jeopardized by artificial canals subsequent to the construction of the canal. The court said:

“Appellants’ claim that the corporation defendant is not called upon to consider or respect the rights of settlers along the line of its canal, who have made such settlement subsequent to the location of the canal, *is not only unsupported by law, but is repugant to every principle of equity and good conscience.*”

The same, in substance, was held in the last two cases above cited.

In support of the general proposition of absolute liability announced by this court in the Eikland case, we submit the following authorities:

- Wiltse vs. Red Wing, 109 N. W., 114;
- Pexley vs. Clark, 35 N. Y., 520;
- Cahil vs. Eastman, 18 Minn., 24;
- Brennan vs. Cumberland, 15 L. R. A. (N. S.), 535 and notes;
- Hauck vs. Pipe Line Company, 20 L. R. A., 642;
- Berger vs. Gas Light Company, 62 N. W., 336;
- Water Company vs. Olinger, 32 L. R. A., 736;
- Texas & Pacific vs. O’Mahoney, 60 S. W., 902;
- Mercantile Company vs. Thurmond, 33 L. R. A. (N. S.), 1061 and notes.
- Essen vs. Wattier, 34 Pac., 756;
- Mallett vs. Taylor, 152 Pac., 873.

The last case cited expressly states that the doctrine of Rylands vs. Fletcher has been adopted by Oregon.

Respectfully submitted,
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